

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

678

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,067

SAUL E. JOFTES

v.

B'NAI B'RITH, INC.,

Appellant

APPEAL FROM A DECISION OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

APPENDIX

FILED JUN 30 1969

Nathan J. Paulson
CLERK

EDWARD D. FRIEDMAN
818 - 18th Street, N.W.
Washington, D.C. 20006
Attorney for Appellant

BERNSTEIN, ALPER, SCHOENE & FRIEDMAN
818 - 18th Street, N.W.
Washington, D.C. 20006
Of Counsel

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MEMORANDUM-ORDER

This matter came on for hearing on plaintiff's motion for a summary judgment of its complaint for benefits under a contract of employment. It appears that there is no genuine issue as to the material facts.

Plaintiff was employed by B'nai B'rith for more than twenty years. As of January 5, 1968, an agreement existed between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association which governed the rights and duties of plaintiff and defendant concerning employment and discharge. Under articles VII and XVII of the agreement, an employee could be dismissed for either "malfeasance, misfeasance or nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith." If an employee were discharged for the former reason, he would not be entitled to severance pay. If, however, he were discharged for "gross personal misconduct," he would be entitled under a particular formula to as much as one year's salary in severance pay.

In 1967, after notice and discussion, B'nai B'rith discharged plaintiff for "malfeasance, misfeasance and nonfeasance." He was and in defendant's words "had been for some time a thorn in the side of the organization." Plaintiff appealed to his superiors to reconsider and after further discussions they agreed to retain him "in another capacity out of an act of compassion and charity."

Subsequently, plaintiff filed a law suit against Rabbi Kaufman. When on January 5, 1968, his superior, Dr. William Wexler, learned of the suit, plaintiff was notified by phone that he was dismissed. Pursuant to the applicable agreement, he was notified that same day by letter from Dr. Wexler that he was dismissed from his employment for "gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith."

On February 14, 1968, Dr. Wexler mailed to plaintiff a second letter which purported to clear up any confusion as to the first letter and which stated that plaintiff was discharged for "malfeasance, misfeasance, and nonfeasance." Defendant contends that it has raised a genuine issue of material fact as to the intent of Dr. Wexler when he fired the plaintiff. The Court disagrees.

Defendant's second letter to plaintiff purporting to amplify the reasons for discharge was mailed about five weeks after the dismissal of plaintiff. The reasons for the dismissal are set forth clearly and unambiguously in the letter of January 5th. Under the employment agreement (Art. VII, §2d), reasons for dismissal must be stated in writing.

Defendant says the actual reasons for dismissal are set forth in the second letter dated five weeks after action was effected. If plaintiff were dismissed for the reasons stated in the second letter, he would be entitled to no severance pay. Defendant also takes the position that plaintiff's work had not been satisfactory for some time and that inferences should be drawn from the first letter as explained by the second letter that the actual reason for the dismissal was "malfeasance, misfeasance and nonfeasance" which would not entitle plaintiff to severance pay under the agreement.

It is noteworthy that the letter of January 5, 1968, quotes precisely the language of the agreement concerning the firing for gross personal misconduct. It is clear and unambiguous.

Thus, the only question in the case is not one of fact or inference and not one which would appropriately be submitted to a jury. It is merely whether the filing

of the law suit, an act not logically connected with the employment and an act which admittedly precipitated the discharge, was "gross personal misconduct" as described in the letter of January 5, 1968, or whether it may be considered as a continuation of the "malfeasance, misfeasance and nonfeasance" which had earlier troubled the organization.

Dr. Wexler, President of the organization, upon being advised of the pendency of the law suit dismissed plaintiff and as required by the contract, stated the reasons in writing. The stated reasons entitled plaintiff to severance pay under the agreement. Under the circumstances, the Court would not be justified in reading into the letter which effected the decision an intent which is not expressed therein. In oral argument, counsel with commendable candor stated that Dr. Wexler's choice of language was deliberate because on a prior occasion when he used the words "malfeasance, misfeasance and nonfeasance," plaintiff filed a law suit.

Plaintiff's motion for summary judgment is granted.

Order accordingly.

Date _____

14 Oliver Smith
Judge

[Caption Omitted in Printing]

ORDER ON JUDGMENT

This cause having come on to be heard on motion of plaintiff for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the Court having considered the pleadings in the action, the exhibits and affidavits in support of and in opposition to the motion, and having heard oral argument and having found that there is no genuine issue of fact to be submitted to the trial Court, and having concluded that plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, that plaintiff's motion for summary judgment is in all respects granted, and it is further

ORDERED and ADJUDGED that the plaintiff, SAUL E. JOFTES have judgment against the defendant B'nai B'rith, Inc., for and in the amount of Twenty Thousand (\$20,000.00) Dollars as severance pay, the amount of One Thousand Six Hundred and Sixty Six and 66/100 (\$1,666.66) Dollars as payment in lieu of notice and the amount of Three Thousand Seventy Six and 80/100 (\$3,076.80) Dollars for accumulated annual leave or a total of Twenty Four Thousand Seven Hundred Forty Three and 46/100 (\$24,743.46) Dollars with interest thereon at the rate of six per centum (6%) per annum from January 6, 1968, until paid, and his costs as assessed by the Clerk.

Dated the 24th day of March, 1969.

U. S. District Judge

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given this 28th day of April, 1969, that
the defendant, B'nai B'rith, Inc.

hereby appeals to the United States Court of Appeals for the District of Columbia from the
judgment of this Court entered on the 24th day of March, 1969
in favor of
against said

BERNSTEIN & ALPER

By _____

Attorney for Defendant
818 - 18th Street, N.W.
Washington, D.C. 20006
298-9191

CIVIL DOCKET

United States District Court for the District of Columbia

PARTIES	NUMBER
	2561-68
SAUL E. JOETES	ACTION FOR
	MONEY DUE UNDER CONTRACT
v.	\$26,666.66 plus interest
B'NAI B'RITH, INC.	TAXED COSTS
	Atty.
	Marshal
	Clerk
	Witnesses
	Depositions
	Examiner
	Ct. Appls.
	TOTAL

CASE CLOSED

CIVIL DOCKET
United States District Court for the District of Columbia

PROCEEDINGS

DATE	DEPOSIT FOR COST BY	FILED
1968		
Oct.	Complaint, appearance	
Oct.	14 Summons, copies (1) and copies (1) of Complaint issued per 10-29	
Nov	18 Answer of deft. to complaint; c/m 11-14; appearance of Bernstein, Alpher, Klavan & Mannes.	filed
Nov,	18 Calendars (N) AC/N	
Dec	16 Motion of pltf. for summary judgment; notice; statement; P&A; affidavit; exhibits (3); c/m 12-13; M.C.	filed
Dec	18 Motion of deft. for extension of time to reply to pltf's motion for summary judgment; P&A; c/m 12-16; M.C.	filed
1969		
Jan	c Statement of genuine of deft.; P&A.	filed
Jan	c Request of deft. for admissions; exhibits 1,2, & 3; c/m 1-8	filed
Jan	17 Response by pltf. to request for admissions; c/m 1-13.	filed
Jan	20 Response by pltf. to deft's opposition to motion for summary judgment; c/m 1-21; exhibits 1 & 2.	filed
Jan	20 Affidavit of Rabbi Jay Kaufman in opposition to pltf's motion for summary judgment; c/m 1-28.	filed
Feb	7 Affidavit of William A. Wexler in opposition to pltf's motion for summary judgment; c/m 2-6.	filed
Feb	19 Motion of pltf. for summary judgment argued & taken under advisement. (Rep: Duane Duschaine)	Gasch, J.

[illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAUL E. JOFTES)
6410 Crosswoods Drive)
Falls Church, Virginia 22044)

Plaintiff)

v.)

Civil Action No. 2561-68

B'NAI B'RITH, INC.)
c/o Rabbi Jay Kaufman,)
Executive Vice-President)
1640 Rhode Island Avenue, N.W.)
Washington, D. C 20015)

Defendant)

COMPLAINT ON A CONTRACT

Saul E. Joftes, for his complaint, alleges as follows:

1. Jurisdiction of this Court is based upon Title 11, §521 of the District of Columbia Code (1967 Edition) and the fact that the amount involved exceeds Ten Thousand Dollars (\$10,000.00) exclusive of costs.

2. Plaintiff is a citizen of the United States and a resident of the Commonwealth of Virginia. He was employed by B'nai B'rith in various capacities in various parts of the world for over twenty years and from 1959 until approximately February 21, 1967, was employed as Secretary-General of the International Council of B'nai B'rith at an annual salary of Twenty Thousand Dollars (\$20,000.00). In February, 1967, plaintiff became the Director of Research for the same employer at the same salary.

3. Defendant is a non-profit corporation organized under the laws of the District of Columbia and doing business in the District of Columbia with national headquarters office at 1640 Rhode Island Avenue, N.W., Washington, D.C. 20036.

4. On or before January 5, 1968, defendant, through its President, Dr. William A. Wexler, broke its contract with plaintiff and fired him peremptorily.

5. On January 5, 1968, Dr. William A. Wexler, as President of defendant, notified plaintiff that he was fired from his position that day for gross personal misconduct.

6. As a member of defendant's Headquarters staff plaintiff was entitled to all of the rights, privileges, and benefits provided for under the terms of an existing written contract between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association, as revised December 15, 1964, and a contract between him and the Retirement Plan of the Supreme Lodge.

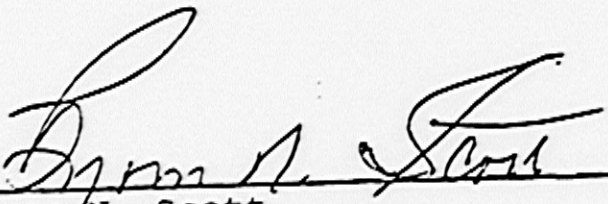
7. Under the terms of said contracts plaintiff was entitled to two months' notice of intent to dismiss; two months' unused vacation allowance; one year's salary as severance pay; and other benefits not at issue here.

8. Immediately following his summary dismissal, plaintiff demanded and has continued to demand that he be paid according to the terms of the said contracts, \$3,333.33 in lieu of two months'

notice, \$3,333.33 for unused vacation allowance, and \$20,000.00 severance pay.

9. Notwithstanding the provisions of the said contract, defendant has failed to make the payments to which plaintiff is entitled under the terms of the contracts with the Supreme Lodge and which payments he has not received.

WHEREFORE, plaintiff demands judgment against defendant in the amount of \$26,666.66 plus interest from January 5, 1968, costs, attorneys' fees, and for such other and further relief as the Court shall deem just and proper.


 Byron N. Scott
 Attorney for Plaintiff
 1010 Vermont Avenue, N.W.
 Washington, D. C. 20005
 Sterling 3-1025

[Caption Omitted in Printing]

ANSWER TO COMPLAINT

The defendant, B'nai B'rith, Inc., for answer to the complaint filed herein, pleads as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Defendant admits the allegations of paragraphs 1, 2, 3 and 6 of the complaint.

2. Defendant denies the allegations of paragraphs 4, 5, 7, 8 and 9 of the complaint except that defendant admits the existence of a written contract between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association and admits that from time to time plaintiff has made various demands with respect to his alleged rights under said written contract.

Third Defense

Plaintiff failed to exhaust the remedies provided him under the aforesaid written contract between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association, exhaustion of which remedies were and are a prerequisite to the filing and pursuit of any civil action by plaintiff against defendant on account of the claims here in question.

WHEREFORE, having fully answered the complaint, defendant demands that the judgment be dismissed and it be awarded its costs.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

AGREEMENT

between the SUPREME LODGE OF B'NAI B'RITH
and the B'NAI B'RITH HEADQUARTERS STAFF ASSOCIATION

as revised December 15, 1964

PREAMBLE

The SUPREME LODGE OF B'NAI B'RITH (hereinafter referred to as B'nai B'rith) and the B'NAI B'RITH HEADQUARTERS STAFF ASSOCIATION (hereinafter referred to as "Staff Association") agree on the following personnel practices:

ARTICLE I - RECOGNITION

1. B'nai B'rith hereby recognizes the Staff Association as the sole and exclusive agency for negotiating policies and conditions, the correction of grievances and disputes, and other matters pertaining to personnel practices for regular executive employees

- a. who operate out of national headquarters in Washington, D.C.;
- b. who are not voting members of the Board of Governors or any national lay governing body of B'nai B'rith; and
- c. whether or not said employees are members of the Staff Association; except that employees of B'nai B'rith Women and of the national office of B'nai B'rith Hillel Foundations, B'nai B'rith Youth Organization and B'nai B'rith Vocational Service are specifically excluded from provisions of this agreement.

ARTICLE II - USE OF FACILITIES AND TIME BY EMPLOYEES

- 1. The use of facilities in the B'nai B'rith Building by the Staff Association is authorized, subject to administrative regulations.
- 2. During working hours no employee shall engage in Staff Association activities on the premises of B'nai B'rith except for the purpose of conference with the employer agency, nor shall an employee engage in any activity other than the business of B'nai B'rith.

ARTICLE III - DISCRIMINATION

- 1. An employee may join or refrain from joining the Staff Association, and B'nai B'rith shall give no preferential treatment to, nor discriminate against, any employee because of membership or non-membership in the Staff Association.
- 2. B'nai B'rith shall not encourage or discourage membership or participation in the Staff Association of any employee who is eligible to join.
- 3. There shall be no discrimination against a regular employee because of race, sex or marital status.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 2

4. B'nai B'rith shall make no individual or private agreement with a regular employee in conflict with or contrary to the terms of the personnel matters covered in this Agreement, nor shall B'nai B'rith enter into any agreement in conflict with the intent of this Agreement to establish for regular employees uniform personnel practices and conditions of employment for the matters defined in this Agreement.

ARTICLE IV - DEFINITIONS AND CONDITIONS OF EMPLOYMENT

1. B'nai B'rith has the sole right to recruit, employ, promote, transfer and dismiss any of its employees, subject to the provisions of this Agreement.

2. A new employee, within ten days after hiring, shall receive from B'nai B'rith a copy of this Agreement and a memorandum setting forth his duties, initial salary and other matters pertaining to his employment.

3. A temporary employee is one who is engaged for a period not to exceed one year. In the event a temporary employee is retained permanently in the same assignment, or one of equivalent duties, he shall be deemed to have completed his probationary period and shall be deemed a regular employee.

4. A part-time employee is one who is hired for less than thirty hours per week in accordance with agreed terms of employment.

5. A regular employee is one who is hired for thirty hours or more a week for work of a continuing nature and who has satisfactorily completed the probationary period as defined in paragraph 6 of this Article.

6. The probationary period for a regular employee shall be six months, but may be extended by mutual agreement in writing for not more than six additional months. B'nai B'rith shall inform an accepted applicant, before employment, of the length and nature of his probationary period.

- a. Written notice of evaluation of performance shall be given to the employee by his immediate supervisor at the end of three months, and at the conclusion of the probationary period.
- b. B'nai B'rith shall give notice in writing to a probationary employee whose probationary period is not to be completed. The notice period shall be the equivalent of one day for every two weeks of continuous employment, or fraction thereof, of the probationary employee, but not to exceed one month.
- c. An employee who is retained following completion of the probationary period shall be deemed a regular employee and shall be entitled to all rights thereof, retroactive to his first day of full-time employment.
- d. When a regular employee is transferred to a new assignment, arrangements shall be made for his return to his previous assignment or equivalent thereof, within six months, if the results of the new assignment are not mutually satisfactory.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 3

ARTICLE VI - SENIORITY

1. Seniority for a regular employee shall be computed on continuous length of service beginning from the first day of full-time employment with any national, district or regional component of B'nai B'rith. Service as an employee of an individual lodge or chapter shall be excluded.
2. Vacation as defined in Article XV and Leaves as defined in Article XIV shall be included in computing length of service.
3. Seniority is interrupted but not lost during other leaves of absence without pay.

ARTICLE VI - SEPARATION

1. A regular employee released from employment because of reorganization or retrenchment shall be given two months separation notice in writing in addition to severance pay as defined in Article XVII.
2. Seniority shall be recognized as a major determining factor for continuing the employment of a regular employee whose job has been eliminated or reduced by reorganization or a reduction in force.
3. In the event it is impractical to reassign a regular employee otherwise subject to separation, B'nai B'rith will make every reasonable effort to help the separated employee find suitable employment elsewhere.

ARTICLE VII - DISMISSAL

1. A regular employee may be dismissed from employment only on the grounds of malfeasance, misfeasance, nonfeasance (including incompetence of a continuing nature), or gross personal misconduct not connected with his official duties but of such a nature as to make his continuing employment a detriment to the purposes of B'nai B'rith.
2.
 - a. A regular employee shall be granted one month notice of dismissal, except in cases of malfeasance.
 - b. In dismissals for incompetence of a continuing nature, after two years service, a regular employee shall receive two months' notice.
 - c. A dismissal for incompetence of a continuing nature shall be based on cumulative evidence and evaluation, including an opportunity for the employee to improve his performance prior to notice of dismissal.
 - d. In all cases, the notice of dismissal or evaluation shall be in writing.
3. Within the notice period, B'nai B'rith may, at its discretion, terminate the actual duties of the employee.

ARTICLE VIII - RESIGNATION

1. A regular employee shall give a minimum of two months' notice of resignation.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 4

ARTICLE IX - RELOCATION

1. A regular employee who is to be relocated, subject to mutual agreement between B'nai B'rith and himself to establish, where necessary, maximum allowances, shall be reimbursed.
 - a. Actual and necessary cost of transporting his family and household goods to his new location.
 - b. Reasonable and necessary expenses incurred in securing suitable housing.
 - c. Actual and necessary living expenses incurred when he is required to report to his new assignment before it is practical to complete his household move, but in no case shall these expenses exceed the travel and per diem allowance.

ARTICLE X - PROMOTION

1. B'nai B'rith shall adhere to the principle of promotion-from-within and shall give preference in filling a staff vacancy to a regular employee if his qualifications are equal to those of an outside applicant.
2. B'nai B'rith shall publicly advise all regular employees of staff vacancies, describing the nature of the duties and professional requirements, and shall invite and act on applications from employees covered by this Agreement prior to making a decision.
3. Seniority shall be a major factor in promotions.

ARTICLE XI - INCREMENTS

1. B'nai B'rith shall consider annually each regular employee for a salary increment.

ARTICLE XII - WELFARE BENEFITS

1. Medical and Hospitalization Plan. A regular employee of B'nai B'rith shall, at his individual option, be covered by group major medical insurance. B'nai B'rith shall pay two-thirds and the employee one-third of the cost of the individual premium.
 - a. Any change in the existing medical and hospitalization plan shall be by mutual agreement of the Staff Association and B'nai B'rith.
2. Life Insurance and Retirement Plan. B'nai B'rith shall maintain a life insurance and retirement plan for regular employees.
 - a. Participation by the employee shall be at his individual option but in accord with established provisions for the exercise of this option.
 - b. Terms and conditions shall be periodically reviewed by B'nai B'rith in consultation with representatives of the Staff Association for the purpose of improving the retirement pension and other benefits of the plan.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 5

ARTICLE XIII - HOLIDAYS

1. The following national and religious holidays shall be granted with pay to regular employees: New Year's Day; Memorial Day; Independence Day; Labor Day; Election Day (maximum of one-half day for those actually voting); Thanksgiving Day; Christmas Day; Rosh Hashona (two days); Yom Kippur; Succoth (first two and last two days); Passover (first two days and last two days); Shevuoth (two days).

- a. For regular employees not stationed in Washington, D.C., legal holidays may be observed in accordance with local practice, but religious holidays shall be observed as specified in paragraphs 1 and 2 of this Article.

2. For Rosh Hashona, Yom Kippur and Passover time off will be given at 3:30 p.m. on the afternoon preceding the first day.

- a. Suitable provision shall be made for employees who observe religious holidays and the Sabbath in the Orthodox tradition.

ARTICLE XIV - LEAVES

1. Sick leave with pay shall be given for absence of a regular employee due to illness, injury or pregnancy; or for medical or dental treatment; or in case of quarantine. Sick leave shall accrue at the rate of one-and-one-half working days per month and is cumulative to a maximum of sixty days. If sick leave beyond the amount accumulated is required, it may be granted by the proper authority designated by B'nai B'rith.

- a. When requested, a doctor's certificate shall be furnished by an employee absent on sick leave for more than two consecutive working days.

2. Maternity leave without pay for a period not to exceed one year shall be granted to a regular employee with two or more years of service. Such leave shall be requested at least sixty days before the last day of active duty.

3. Emergency leave with pay not to exceed one week may be granted to a regular employee for personal emergencies of death or serious illness in the immediate family of the employee.

4. A regular employee called for jury duty shall receive the difference between jury pay and his regular pay, except on days when the jury is not in session at which time the employee shall report for work.

5. A regular employee called for military reserve training shall receive the difference between military pay and regular pay (if the former is the lesser) for a period not to exceed two weeks in any calendar year.

6. Military leave without pay shall be granted to a regular employee for extended active service with the Armed Forces. He shall be entitled to return to his employment without loss of prior rights or privileges, provided he applies for reinstatement within ninety days of his completion of satisfactory service.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 6

7. A regular employee shall have the right to apply for leave with pay for academic study and other purposes when such leave will, in the opinion of B'nai B'rith, be of sufficient benefit to B'nai B'rith.

ARTICLE XV - VACATION

1. Vacation allowance shall be granted a regular employee at the rate of one-and-two-thirds working days per month and shall be computed on a calendar year basis.

2. An employee shall be entitled to vacation accrual after three months service, retroactively, and from then on.

3. Vacation allowance which will accrue to a regular employee during a calendar year may be credited to him at the beginning of the year. If an employee resigns from B'nai B'rith employment and is indebted for vacation taken but unearned, appropriate refund or salary deduction shall be made.

4. Vacation allowances not used may accumulate to a maximum of twenty working days, which shall be additionally available at the beginning of the calendar year; however

- a. in the event the regular employee has accumulated over a period of two years or longer, more than twenty working days of vacation allowance at the beginning of a new calendar year, and his employment is terminated during that year, he shall be entitled to the accumulation in excess of twenty working days, but not to exceed forty working days.

5. Unused vacation allowance shall be taken at the time of termination of employment; but no vacation allowance shall be granted in dismissals for dishonesty, or in resignations without the prescribed notice period.

6. Vacations shall normally be taken in summer, but in any event at a time mutually agreeable to the employee and B'nai B'rith.

ARTICLE XVI - TRAVEL ALLOWANCE

1. A regular employee engaged in authorized travel shall be reimbursed

- a. for actual cost of rail or air fare (not to exceed air coach when available, or pullman or lower berth sleeper) or such other means of conveyance as may be applicable and appropriate.
- b. for actual cost of taxi or limousine service to and from depots and airports.
- c. at the rate of ten cents per mile plus tolls and parking, when a privately-owned automobile is utilized for convenience of B'nai B'rith.
- d. at actual cost when a publicly-rented automobile is utilized for the convenience of B'nai B'rith.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 7

- e. for the equivalent of air coach (or first-class rail fare when air flight would not be applicable) when a privately-owned automobile is utilized for the convenience of the employee.
 - f. for actual cost of reasonable hotel accommodations.
 - g. reasonable laundry and valet charges for travel of five consecutive days or longer.
 - h. a per diem allowance of ten dollars.
 - 1. The per diem allowance is to include 50 cents for necessary local phone calls and 75 cents for necessary local transportation (bus, subway, taxi, etc.). Necessary expenditures in excess of these allowances and other miscellaneous expenditures of a regular employee in travel status, authorized and necessary and not otherwise covered by the provisions herein, shall be reimbursed at actual cost.
2. When meals are provided in kind by B'nai B'rith, or any of its components, the per diem shall be reduced as follows:
- \$1.50 for breakfast
 - \$2.00 for luncheon
 - \$4.00 for dinner
3. For purposes of computing fractional time periods, the day shall be deemed to be in four parts:
- a. from 6 a.m. to 12 noon;
 - b. from 12 noon to 6 p.m.;
 - c. from 6 p.m. to 12 midnight;
 - d. from 12 midnight to 6 a.m.
- and the fractional per diem shall be computed at \$2.50 for each part of the day.
4. A regular employee not in a travel status but incurring petty cash expenses necessary to the professional performance of his assignment shall be reimbursed actual cost.
5. A regular employee engaged in foreign travel shall be reimbursed the regular per diem allowance except
- a. he shall be reimbursed a special allowance not to exceed actual cost when the circumstances impose traveling costs in excess of the regular per diem.
 - b. Canada shall be deemed domestic travel.
6. Employees shall use proper prudence and judgment in incurring travel and petty cash expenses.

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 8

7. An employee shall have the right to draw advance funds for a specific travel assignment in a sum not to exceed the estimated cost.

ARTICLE XVII - SEVERANCE PAY

1. Severance pay shall be computed at the rate of three weeks salary for each year's service up to a maximum of one year's salary and shall be paid a regular employee whose employment is terminated by
 - a. separation as defined in Article VI
 - b. disabling illness of a permanent nature, providing the disabled employee has one or more years of seniority.
 - c. dismissal for incompetence of a continuing nature or for gross personal misconduct, as defined in Article VII.
2. Severance pay for dismissal on the grounds of malfeasance, misfeasance, or nonfeasance other than incompetence of a continuing nature is not authorized, except that a B'nai B'rith committee composed of the President, Executive Vice President and Chairman of the Personnel Practices Committee may, at its discretion, consider terms of dismissal for malfeasance and misfeasance in individual cases.
3. The computation of severance pay shall include prorated allowances for fractional periods of a year.
4. Severance pay shall be exclusive of unused vacation allowance or notice periods of separation or dismissal; however, unused vacation allowance shall not be considered in computing length of service for severance pay.

ARTICLE XVIII - GRIEVANCE PROCEDURE

1. In the event of a grievance the party or parties involved shall have the right to be represented personally, or by the Staff Association, or by counsel.
2. The procedure for handling a grievance shall be as follows:
 - a. The aggrieved party (or parties) shall present his complaint to his immediate supervisor. In the event the matter is not satisfactorily settled within two weeks, then,
 - b. the aggrieved party (or parties) shall have the right to take up the complaint with the next higher authority, continuing this procedure up to the office of the Executive Vice President of B'nai B'rith. In the event the complaint is still not satisfactorily settled within a period of two weeks,
 - c. the aggrieved party (or parties) shall have the right to take up the complaint with the President of the Order, or such committee as the President may designate. In the event the complaint is not satisfactorily settled within a period of six weeks,

AGREEMENT between B'nai B'rith and Headquarters Staff Association - 9

- d. the aggrieved party (or parties) then shall have the right to submit the matter to arbitration as defined in paragraph 3 of this Article.
3. In the event a complaint or dispute is unresolved prior to arbitration the procedure shall be as follows:
 - a. B'nai B'rith and the Staff Association shall select an impartial arbitrator mutually agreed upon or a three-member arbitration board which shall include one member appointed by B'nai B'rith, one member appointed by the Staff Association and a third member selected by the two who shall serve as chairman.
 - b. The decision of the arbitrator or the majority decision of the arbitration board shall be binding upon all concerned.
4. A discharged employee who contests his dismissal as a grievance must do so within one week of receipt of written notice of dismissal. Until final adjudication of his grievance he shall be deemed a regular employee.
 - a. In extraordinary cases B'nai B'rith may suspend the employee, but if decision is ultimately made in the employee's favor, all compensation, leave and other privileges shall be awarded retroactively to the date of his suspension.

ARTICLE XIX - EXPIRATION AND RENEWAL OF AGREEMENT

1. This revised Agreement shall come into full force and effect as from January 1, 1965, shall remain in force for a period of one year, and shall be renewed automatically each year thereafter, unless either party gives written notice of termination or renegotiation to the other party at least ninety days prior to the expiration date.

B'NAI B'RITH 1640 RHODE ISLAND AVENUE, NORTHWEST, WASHINGTON, D.C. 20036 • (202) 333-5284

RABBI JAY KAUFMAN
Executive Vice President

PERSONAL & CONFIDENTIAL

January 6, 1967

Mr. Saul E. Jofte
B'nai B'rith International Council
1640 Rhode Island Ave., N.W.
Washington, D.C. 20036

Dear Saul:

I have informed you orally and put into writing notice that your employment with B'nai B'rith and as Secretary-General of the International Council is to be terminated two months after receipt of this letter, namely March 6, 1967. This communication serves as the common and mutually agreed upon expression of Dr. William A. Wexler, President of B'nai B'rith, and Mr. Maurice A. Weinstein, Chairman of the International Council.

The cause for your separation is your lack of capacity and competence to handle the position of Secretary-General. The repeated requests of Mr. Weinstein to have ample communication with the members of the International Council through The Courier have not been met by you. We realize that you were unable to create this and other vehicles of communication such as are regarded as indispensable. The desire for you to establish relations with the staff so that there would be a cooperative effort and a channeling of aid from the various commissions and committees into the overseas Districts was not undertaken by you, because of your inability to establish a rapport with members of the staff. Repeated requests for you to relate properly to the ADL personnel in order to set-up a Human-Relations operation in South America were ignored by you and non-communicative and belligerent relations continued so that the entire endeavor had to be consummated without you.

Because of your years of employ, you are entitled to:

i/ The maximum severance pay of one year's salary, this being in accordance with the Agreement between the Supreme Lodge and the B'nai B'rith Headquarters Staff Association.

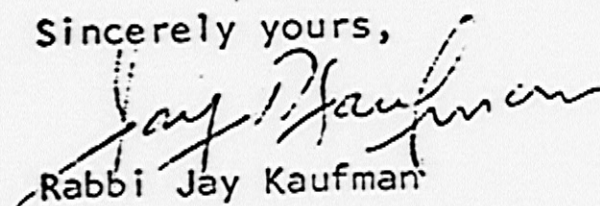
Mr. Saul E. Jofes
January 6, 1967
Page -2-

2/ Any unused vacation which may have accrued to you.

3/ You are eligible for a number of elections in your retirement insurance and you will be hearing from the Trustees in due course.

This is merely an official notice and there will be another occasion to express in more proper terms the gratitude of B'nai B'rith for your devoted service and my personal appreciation to you for our own relationship.

Sincerely yours,



Rabbi Jay Kaufman

JK/ejm
cc: Dr. Wm. A. Wexler
Mr. Maurice A. Weinstein



RABBI JAY KAUFMAN
Executive Vice President

B'NAI B'RITH

1640 RHODE ISLAND AVENUE, NORTHWEST, WASHINGTON, D.C. 20036 • (202) 353-5284

PERSONAL

February 20, 1967

Mr. Saul E. Jofes
B'nai B'rith International Council
1640 Rhode Island Avenue, N.W.
Washington, D.C. 20036

Dear Saul:

We deem it appropriate to supplement and supersede the letter of January 6, 1967, which terminated your employment.

In addition to the causes for termination based on incompetence of a continuing nature as stated in the above letter, you are dismissed from employment on the further grounds of malfeasance, misfeasance and non-feasance.

Pursuant to Article VII, Section 3, of the Agreement between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association, as revised December 15, 1964, your duties as an employee of B'nai B'rith are terminated upon your receipt of this letter.

Your severance pay will be determined pursuant to Article XVII, Section 2 of the said Agreement.

In the event of grievance, you are entitled to all of the rights outlined in Article XVIII of the above Agreement.

Very Sincerely,

Rabbi Jay Kaufman

JK/ejm
cc: Dr. Wm. A. Wexler
Mr. Maurice A. Weinstein
Mr. Albert Z. Elkes

Receipt Acknowledged

_____ Date

Hand Delivered: February 20, 1967

MEMO B'NAI B'RITH

1640 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. • Executive 3-5284

FROM: Albert Z. Elkes

DATE: March 22, 1967

SUBJECT: Memorandum of Agreement

TO: Rabbi Jay Kaufman
Saul E. Jofes

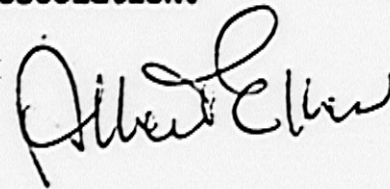
Following is a memorandum of agreement on the future employment of Saul E. Jofes upon which we agreed at the meeting in New York:

- 1) Saul E. Jofes agrees to relinquish his post as Director General of the B'nai B'rith International Council.
- 2) He will be transferred to a new post, outside of the International Council, with the status of a head of a department, at the same salary. He will continue to be responsible to the Executive Vice President of B'nai B'rith.
- 3) In broad outline, his new post will concern itself with research, special assignments, membership, speech making, fund raising and other allied duties, domestically and abroad, utilizing his background, abilities and experience.
- 4) Information previously communicated to interested parties will be followed by correspondence further clarifying his new status.

We know that all parties concerned will do everything possible to cooperate in making this agreement productive, workable and in the best interests of B'nai B'rith.

Please sign the extra copy and return it for our official record and for the files of the B'nai B'rith Headquarters Staff Association.

Cordial regards.



AZZ:mbh

cc: Dr. William A. Wexler
Judge David Coleman
Maurice A. Weinstein
Mortimer J. Rubin

I concur with the above _____



OFFICE OF THE PRESIDENT

B'NAI B'RITH

1640 RHODE ISLAND AVENUE, NW, WASHINGTON 25, D. C. • Executive 3-5284

January 5, 1968

Mr. Saul E. Jofes
1640 Rhode Island Avenue, N. W.
Washington, D. C.

Dear Mr. Jofes:

It is with deep personal regret that I inform you that you are hereby dismissed from your employment with B'nai B'rith for gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith. I refer to the law suit you are bringing against the Executive Vice President of B'nai B'rith.

You are to clear your personal things out of the building today, Friday, January 5, 1968, and to turn in any keys you may have to the B'nai B'rith Building, identity cards, and property of B'nai B'rith, immediately.

Very truly yours,

Dr. William A. Wexler

Saul E. Jofcs
6410 Cross Woods Drive
Lake Barcroft, Falls Church
Virginia 22044

January 16, 1968

Joseph Sklover, Comptroller
B'nai B'rith
1640 Rhode Island Avenue, N. W.
Washington, D. C.

Dear Mr. Sklover:

On Friday, January 5, 1968, Yale Goldberg handed me an unsealed letter signed by President William A. Wexler notifying me that I had been dismissed from my employment with B'nai B'rith "for gross personal misconduct of such a nature as to make your [my] continuing employment a detriment to the purposes of B'nai B'rith".

By my contract of employment with B'nai B'rith I immediately became entitled to severance pay, a pay check for my unpaid salary to that date, accumulated vacation pay, payment for the provided for period of notice of intent to dismiss and withdrawal of my contributions to the retirement fund with interest.

During a conversation in the office of the Executive Vice President on January 5, 1968, President Wexler told you to determine all sums due me and to make payment on the following Monday.

On more than one occasion since then, I have told you that I want my severance pay, my regular pay, my accumulated vacation pay, my notice, my contributions to the retirement fund plus interest and any other monies due me.

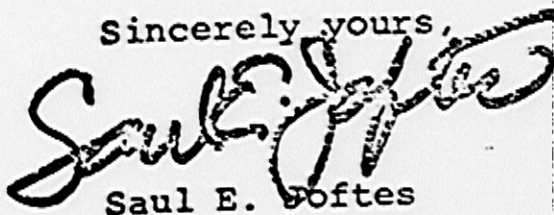
On Friday, January 12, 1968, in the presence of Albert Z. Elkes and Dr. Sidney Nelson you told me that the monies due me were being held up "because of the controversy".

Joseph Sklover, Comptroller
January 16, 1968
Page 2

The purpose of this letter is to demand formally that the monies due me be calculated and paid immediately. Nobody has a legal right to interfere with the obligation of my contract with B'nai B'rith for any reason. I, of course, feel that you are not acting upon your own responsibility in this and will continue to think so until you tell me differently.

The agreement between B'nai B'rith and the Headquarters Staff Association provides for the above demanded payments in cases such as mine even though the charge of "gross personal misconduct" in Dr. Wexler's January 5, 1968 letter is provably untrue and the agreement makes no provision for delay or refusal of those payments because of somebody's whim, caprice or malice. Please take care of this immediately.

Sincerely yours,



Saul E. Softes

cc: Dr. William A. Wexler, President
Rabbi Jay Kaufman, Executive Vice President
Rabbi Mortimer J. Rubin



B'NAI B'RITH

3640 RHODE ISLAND AVENUE, NW, WASHINGTON 36, D. C. • EXECUTIVE 3-5284

OFFICE OF THE PRESIDENT

REGISTERED MAIL

RETURN RECEIPT REQUESTED

February 14, 1968

Mr. Saul E. Jofes
6410 Cross Woods Drive
Lake Barcroft
Falls Church, Virginia 22044

Dear Mr. Jofes:

I have just returned from a trip abroad to find your letter of January 16, 1968, setting forth your version of your conduct leading to your discharge, alleged conversations in relation thereto and demanding, among other things, severance pay.

While I cannot agree with your statement concerning your discharge, or your conclusions as to your rights, I see no purpose to be served in arguing the issues with you through correspondence.

I respond to your letter only to make it clear that your dismissal dated January 5, 1968, was by reason of misconduct constituting "malfeasance, misfeasance and non-feasance" within the contemplation of the agreement between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association, as revised December 15, 1964. Moreover, information which has come to my attention since my letter to you of January 5, 1968, including your continuing failure to comply with the directions therein to immediately turn over all keys, identity cards, and other property of B'nai B'rith, reinforces the integrity of the reasons and grounds for your discharge.

For the third time, you are again directed forthwith to surrender to us all B'nai B'rith keys, identity cards and other B'nai B'rith property in your possession. Additionally, since you are no longer in the employ of this organization, your presence at any time in our headquarters building and your use of the parking area reserved for employees, is both unwelcome and unauthorized and you are hereby directed not to enter this building or use the aforesaid parking area.

Mr. Saul E. Jofes
February 14, 1968
Page -2-

I trust the foregoing will meet with your immediate compliance and will also terminate the need for any further correspondence between you and the undersigned.

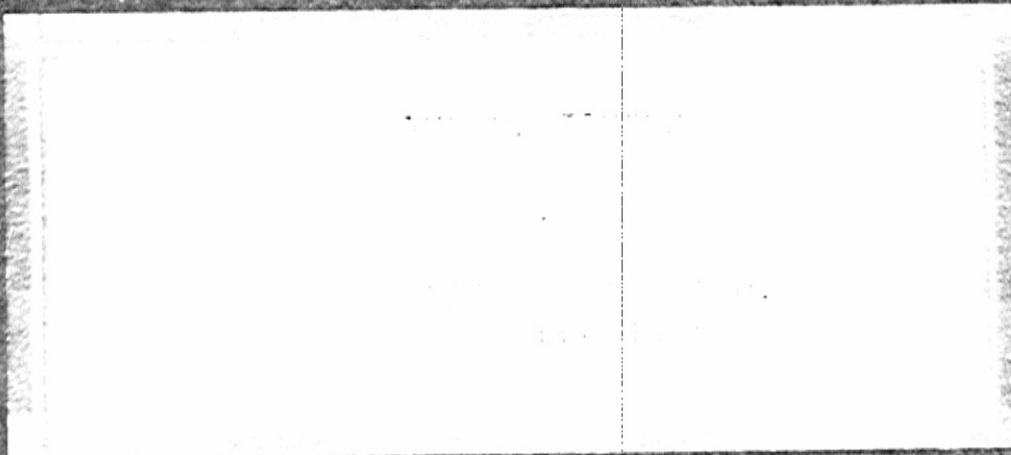
Very truly yours,

Dr. William A. Wexler

37-7
BRIEF FOR APPELLEE

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,067



Appeal from an Order on Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1969

Nathan J. Paulson
CLERK

Byron N. Scott
Attorney for Appellee
1010 Vermont Avenue, N.W.
Washington, D. C. 20005

OK

BRIEF FOR APPELLEE

IN THE
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,067

B'NAI B'RITH, INC., Appellant

v.

SAUL E. JOFTES, Appellee

Appeal from an Order on Judgment of the United States
District Court for the District of Columbia

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STATUTE

Labor Management Relations Act of 1947, c. 120, 61 Stat. 136,
as amended.

STATEMENT OF THE ISSUES

1. Is failure to utilize rights provided by the Agreement between the Supreme Lodge of B'nai B'rith and the B'nai B'rith Headquarters Staff Association an absolute defense to this cause of action?

2. Did the Trial Court err by disposing of this case by Summary Judgment?

This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court was based upon Title 11 Section 521 of the District of Columbia Code (1967) and upon the fact that the amount involved exceeded the sum of Ten Thousand Dollars, exclusive of costs. A summary judgment in favor of Plaintiff was entered March 24, 1969 in the United States District Court. This Court has jurisdiction under 72 Stat. 348, 28 USCA Sec. 1291 (1958).

STATEMENT OF THE CASE

This is an action for liquidated damages for breach of contract. When appellant answered the complaint, appellee moved for summary judgment. Appellant opposed the motion but did not counter move. The Trial Court, Judge Gasch, after finding that there was no genuine issue as to the material facts, granted appellee's motion (App. 1) and this appeal followed. Except for a more-or-less parenthetical and unsupported by precedents observation that Courts should not grant summary judgments in "labor relations" cases, appellant relies exclusively upon Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) to sustain the appeal on the ground that the case is subject to LMRA and that under Maddox, an alleged failure of appellee to exhaust his rights under an agreement between appellant and its Headquarters Staff Association, made up exclusively of its "regular executive employees", (App. 14, Article I) bars the action.

After over twenty years of employment by B'nai B'rith in various capacities, including but not limited to Director General of its Office of International Affairs, Secretary General of its International Council and at the time material, its Director of Research, a Department Head (App. 26), at a salary of Twenty

Thousand Dollars per annum, appellee was dismissed instanter by appellant's president. This was accomplished by a letter dated January 5, 1968 which, among other things, said "* * * you are hereby dismissed from your employment with B'nai B'rith for gross personal misconduct of such a nature as to make your continuing employment a detriment to the purposes of B'nai B'rith. I refer to the law suit you are bringing against the Executive Vice President of B'nai B'rith. * * * you are to clear your personal things out of the building today, Friday January 5, 1968 * * *".

Appellee chose not to contest his dismissal but, after several ignored oral demands, he, by a letter dated January 16, 1968 to appellant's comptroller with copies to appellant's president, executive vice president, and the president of the Headquarters Staff Association, demanded severance pay, his unpaid salary to January 5, 1968, his accumulated vacation pay, a lump sum payment in lieu of the required notice period, and the return of his contributions to the B'nai B'rith retirement fund with interest (App. 28-29). All of these were provided for in the agreement between appellant and the Headquarters Staff Association which is set forth in the Appendix at pages 14-22.

The president of B'nai B'rith responded to this written

demand by a letter dated February 14, 1968 in which he said, among other things, "* * * I see no purpose to be served in arguing the issues with you through correspondence. * * * your presence at any time in our headquarters building and your use of the parking area reserved for employees, is both unwelcome and unauthorized and you are hereby directed not to enter this building or use the aforesaid parking area. I trust the foregoing will meet with your immediate compliance and will also terminate the need for any further correspondence between you and the undersigned". (App. 30-31).

Appellee thereafter received a check for his unpaid salary and still later his contributions to the retirement fund were returned to him, with interest. No severance pay, accumulated leave and/or notice pay, nor a decision as to whether appellee would get them having been received, and his demands having been ignored, (Exhibit 2 attached to appellee's response to appellant's opposition to his motion for summary judgment) appellee filed this action on October 14, 1968. There is nothing in the record to support appellant's assertion on page 12 of its Brief that "B'nai B'rith denied his claim on the grounds that his discharge was job-connected."

The Staff Association Agreement referred to above (See App.

14-22) provides that an employee with over twenty years of service who is dismissed for "gross personal misconduct" is entitled to receive a sum equal to one year's salary as severance pay (Articles XVII and VII); a lump sum for accumulated vacation pay (Article XV, 4 a); and one month's notice of intent to dismiss (Article VII 2 a). The Agreement also contains "Article XVIII -- Grievance Procedure" (App. 21-22). It provides that if a member of the Staff Association has a "grievance" he "shall have the right" to file it personally. It provides, further, that, if he starts a grievance, he must talk to his "immediate supervisor" first. Appellee's immediate supervisor was the executive vice president who had tried to fire him in 1967 (App. 26, 23-25). The Agreement provides, further, that, if appellee does not get satisfaction from the executive vice president within two weeks, he "shall have the right" to appeal all the way up to the executive vice president. It provides, further, that, if appellee for a second time does not get satisfaction from the executive vice president within two weeks, he "shall have the right" to appeal to the president of B'nai B'rith, the man who had just fired him and had written him the February 14, 1968 letter (App. 27, 30). The "Grievance Procedure" also provides that, if appellee does not get satisfaction from the president of the

order within six weeks, he "shall have the right" to submit his demands to arbitration by an arbitrator selected by appellant and the Staff Association or a three member board selected by appellant and the Staff Association and their nominees. It is provided that the arbitration decision "shall be binding upon all concerned".

SUMMARY OF ARGUMENT

I. Appellant's confidence in Maddox is misplaced since the Federal Labor Management Relations Act of 1947, as amended, is not applicable to this case and it would have to be in order to make Maddox compelling.

II. The Trial Court properly granted appellee's motion for summary judgment on a finding that there was no genuine issue as to the material facts and a conclusion that appellee was entitled to judgment as a matter of law for his liquidated damages.

ARGUMENT

I. The Federal Labor Management Relations Act (LMRA) of 1947, as amended, is not applicable to this case.

A. The Headquarters Staff Association is made up exclusively of "regular executive employees" (App. 14, Article I, 1, a,b,c). The members are not "employees" as contemplated by the Act and the Association is not a "labor union" as defined by the Act, Title I, Sec. 2, (3), (5), (11). The Act, therefore, is not applicable in this case and Maddox is neither controlling nor persuasive. International Organization of Masters M & P v. N.L.R.B., 122 U.S.App.D.C. 74, 351 F. 2d 771 (1965).

B. Appellee was a supervisor. Title I, Section 2 (3) of the Act provides that "The term employee [to whom the Act shall apply] * * * shall not include * * * any individual employed as a supervisor * * *." Appellee was a "head of a department" (App. 26) as appellant's Director of Research (Complaint, paragraph 2, App. 10 and Answer, paragraph 1 of Second Defense, App. 13). Title I, Section 2 (11) of the Act says:

The term supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to

recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Every "head of a department" has such authority over the employees in his department.

The reasoning of this Court in International Union of United Brewery, F. C. S. D. and D. Workers of America, AFL-CIO v. N.L.R.B., 111 U.S.App.D.C. 383, 298 F. 2d 297, 302-305 (1961); cert. den., 369 U.S. 843 (1962), would hold that appellee was a supervisor, not covered by the Act and, therefore, not required by Maddox to exhaust administrative procedures and submit to binding arbitration. See also Local 636, etc., Plumbing and Pipe Fit. Ind. of U. S. v. N.L.R.B., 109 U.S.App.D.C. 315, 287 F. 2d 354, 362 (1961).

C. With or without Maddox, appellant is estopped by the conduct of its president to rely on unexhausted grievance and arbitration procedures as a defense to this cause of action.

Orally on January 5, 1968 and after, and in writing on January 16, 1968, appellee demanded payment of benefits due him under the Staff Agreement (App. 28). He received no positive answer. By his letter of February 14, 1968, (App. 30-31) appellant's president ignored appellee's demands for other than severance pay and, in effect, told appellee that the question of

severance pay was up to a "committee composed of the President, Executive Vice President and Chairman of the Personnel Practices Committee" (App. 21). The letter directed appellee to stay out of the B'nai B'rith building, told him to quit writing letters to the president and indicated to appellee that he would hear nothing further from B'nai B'rith or its officers.

Appellant's president stated in September 1968 that he (a) had not discussed severance pay with the executive vice president or his lawyer (p. 31 of Exhibit 2 to plaintiff's response to defendant's opposition to his motion for summary judgment); (b) had not decided whether appellee was entitled to severance pay (p. 32, ibid.); (c) had not discussed severance pay with the provided for committee of three (p. 36, ibid.); and (d) indicated that he had no intention of doing anything further about severance pay.

Thus, appellee had taken his claim for severance pay to his immediate supervisor, the executive vice president, and to the president of the order. Neither would talk to him about it. He had taken his claim to the Staff Association and they had done nothing. As late as September 1968, he had had no decision on his claim. The president and executive vice president of appellant had repudiated the contractual procedures. Appellee, even

if covered by the federal law, was not required to exhaust his grievance and arbitration procedures. Vaca v. Sipes, 386 U.S. 171, 185 (1967).

D. Pursuit of the grievance procedure of the Staff Agreement by appellee would have availed him nothing. The grievance procedure called for a talk with the immediate supervisor (App. 21). That was the executive vice president (App. 26). The second step was to the same executive vice president who had attempted to fire appellee a year before. The third step was to the president who had fired appellee (App. 21). If appellee's January 16, 1968 letter was a grievance proceeding, he was completely frustrated in his attempt by the dilatory tactics of those two worthies in refusing to pay any attention to him. If the January 16, 1968 was not an attempt to initiate a grievance, the attitudes of the executive vice president and president showed that any filing of a grievance would have been futile. See Dr. Wexler's letter of February 14, 1968 (App. 30-31). An employee is not required to exhaust the remedies provided him under the grievance procedure before bringing suit if the statements and actions of the employer demonstrate that it would be futile to do so. Humphrey v. Moore, 375 U.S. 335, (1964); United Protective Workers v. Ford Motor Co., 223 F. 2d 49 (CA7

1955).

E. The Article XVIII - Grievance Procedure was not the exclusive method for determination of appellee's claim for severance pay open to appellee. He could have gone to the Committee of Three (App. 21, Article XVII, 2). Contrary to Footnote 10 on page 11 of Appellant's Brief, he was not limited to the filing of a grievance or the seeking of arbitration. In the Agreement it is provided that he "shall have the right to". There is nothing in Maddox to support appellant's contention that "may" or "shall have the right to" shall mean "must". In Maddox, it is said that "may discuss" meant a pre-grievance act, "without bringing in his Committeeman and formally embarking on Step 1". (658). The Agreement "Grievance Procedure" makes no provision for calling in the Committeeman; in fact, the Grievance Procedure makes no provision for a Committeeman. In Maddox, the Union had to do the representing; not so here (App. 21; Article XVIII, 1). It is said in Maddox, "The federal rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclusive remedy (657)." So here, since the remedy was not exclusive, appellee could bring his court suit.

II. There was no genuine issue as to the material facts and appellee was entitled to judgment for his liquidated damages as a matter of law.

Appellant speculates on what might have happened had the appellee taken his claim to arbitration but cites no genuine issue as to a material fact which would have made summary judgment improper. Some observations on appellant's argument on this issue must be made. There is neither provision nor guarantee that "the Union" [the Staff Association] would have "participated in the grievance proceedings". The only participation of the Staff Association under the Agreement would have been in the selection of an arbitrator or arbitrators if appellee had elected to exercise his right to arbitration, and representation of appellee if he had chosen to call upon the Association to do so. (See page 14 of Appellant's Brief). If (page 15 of Appellant's Brief) the decision of the Trial Court was not on "a full record", whose fault was it? (See Bruce Construction Corp. v. U. S., 242 F. 2d 873 (CA5, 1957), and Dewey v. Clark, 86 U.S.App.D.C. 137, 180 F. 2d 766 (1950)). There is very little restriction on what a litigant may attach to his opposition to a motion for summary judgment.

"Gross personal misconduct" and "malfeasance, misfeasance, and nonfeasance" may be "magic words" and, at the same time, not "push-button words of art" but, as used in the agreement they are "mutually exclusive" since they are separated in the Agreement by the disjunctive "or". (Pages 15 to 16 of Appellant's Brief). There is nothing in the record to support the statement on page 16 that Dr. Wexler's failure to use the words "not connected with your official duties" was "carefully designed" or "deliberate" and not "inadvertent." Severance pay is earned pay, not a "bonus."

CONCLUSION

Since this case is not subject to federal labor law;
since Republic Steel Corp. v. Maddox is not applicable and
since no genuine issue as to a material fact has been estab-
lished, the Trial Court properly granted summary judgment
and the judgment should be affirmed.

Respectfully submitted,

Byron N. Scott
Counsel for Appellee